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Supreme Court of the United States

OCTOBER TERM, 1954

No. 50

THE BISSO NO. 9

WILLIAM A. BISSO, JR., RECEIVER, NEW ORLEANS COAL AND BISSO TOWBOAT CO.,
Petitioner,

versus

INLAND WATERWAYS CORPORATION,
Respondent.

On Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF AMICUS CURIAE.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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BRIEF OF AMICUS CURIAE.

THE INTEREST OF THE AMICUS CURIAE

This brief is presented with the written consent both of Petitioner and Respondent,[1] in support of the position of the Respondent, and in the interest of a number of clients, some of whom[2] are the owners and operators of fleets of river towboats and barges plying the Mississippi River and its tributaries and the Intracoastal Waterway,[3]

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[1] On file with the Clerk.

[2] American Barge Line, Inc., Coyle Lines Incorporated, John I. Hay Company, Mississippi Valley Barge Line Company and Union Barge Line Corporation.

[3] Inland waterways between Brownsville, Texas on the west and Carrabelle, Florida on the east.

and the others are the owners and operators of large fleets of harbor tugs in New Orleans [4] and Mobile,[5] respectively.

All of these parties, who constitute a small but important segment of the towing industry, for a number of years have performed and are performing towage services for each other and the public under contracts providing for the release from liability of the towing craft for its negligence substantially like the release clause whose validity has been attacked in the instant case. Accordingly the interpretation placed on such release clauses will have a material effect upon the methods of doing business of all of these parties.

THE QUESTION PRESENTED

The question presented for review is generally whether a tug owner may contract against liability for damage occasioned to the tug's tow by negligence of the tug. This question arises through the application in this case of a clause in a towage contract [6] which releases the towing vessel and its owner from liability for damage to its tow and in addition contains what is commonly denominated a "pilotage clause" which provides that the master, crew and employees of the towing vessel shall,

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[4] Crescent Towing & Salvage Co., Inc.

[5] Mobile Towing & Wrecking Co., Inc.

[6] R 11-12. "The movement contemplated will be done at the sole risk of the 'craft to be towed' and its cargo, and neither the [tow] boats and/or any other equipment used in said [towage] service nor the owner, charterer or hirer thereof shall be liable for any loss or damage to the 'craft to be towed' or its cargo nor for any damage done by the 'craft to be towed', however occurring.

"The master and crews and employees of all [tow] boats and/or other equipment assisting the 'craft to be towed', shall, in the performance of said service, become and be the servants of the 'craft to be towed', regardless of whether the 'craft to be towed' assists in the service in any way, and irrespective of whether they be aboard the 'craft to be towed' or in command thereof."

in the performance of the towage service, become and be the servants of the tow, regardless of whether the tow assists in the service in any way and regardless of whether or not such personnel be on board the tow or in command thereof.

The finding that the Barge BISSO NO. 9 was lost by reason of the negligent navigation of respondent's Towboat CAIRO is unchallenged, and therefore the question is squarely presented whether the Towboat CAIRO and her owners are released from liability under the clause in question, for the negligent navigation of the towboat—simple negligence.

SUMMARY OF ARGUMENT

No decision of this Court has declared invalid a towage contract wherein a tower has contracted unequivocally against liability for negligent towage; and the weight of authority in the District and Appellate Federal Courts has approved such contracts. In addition, this Court has specifically approved the validity of the so-called "pilotage clause".[7]

Public policy does not prohibit release liability clauses in towage contracts, but on the contrary, the highest public policy is found in the enforcement of the contract into which the parties have entered.

The Congress of the United States has never prohibited stipulations for the release from liability for damage to the tow occasioned by the negligence of the towboat's master and crew, but on the contrary, has extended to those towers subject to Part III of the

[7] A clause of similar import to the second paragraph of the clause quoted in the preceding note.

Interstate Commerce Act the protection of the Harter Act and of the Carriage of Goods by Sea Act, thus exempting such towers from liability for negligence of the towboat's master and crew.

This Court should not now, by a judicial pronouncement, declare invalid a practice which has existed for so long a time, which has so frequently received judicial sanction, and which, if now forbidden, would create the anomaly that common carriers subject to Part III of the Interstate Commerce Act when performing towage, would have an exemption from liability for the negligence of their towboats' masters and crews not afforded to private carriers performing similar towages and for which those private carriers would be forbidden to contract.

ARGUMENT

The Jurisprudence

The crux of the Petitioner's argument is that in *The Syracuse* [8] this Court established a rule, reiterated in *The Wash Gray*,[9] that a tower cannot contract against liability for damage to the tow occasioned by the towboat's negligence. This is a misconception of the holding of these two cases. All that was decided was that the release clauses in the respective towage contracts therein construed were ineffectual because they did not evidence any clear intent to relieve the tower from liability for negligence of the master and crew of the towing vessel. This is the construction that has been put upon these cases, not only by a number of the District and Appellate Federal Courts, but also by this Court in *Sun Oil Com-*

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[8] 12 Wall. (79 U.S.) 167 (1871).

[9] 277 U.S. 66 (1928), officially titled *Compania de Navegacion, Interior, S. A. v. Fireman's Fund Ins. Co.*, but universally cited as *The Wash Gray*.

pany v. Dalzell Towing Company [10] wherein Your Honors approved the "pilotage clause". It was there argued that to hold that clause valid would create a conflict with the holdings in *The Syracuse* and *The Wash Gray*. Your Honors disposed of this argument by saying that the release clauses involved in those two cases were not similar to the clause under consideration in the *Sun Oil Company-Dalzell Towing Company* Case.[11]

An analysis of the jurisprudence clearly demonstrates the fallacy of Petitioner's position.

It would serve no useful purpose to review or analyse the jurisprudence prior to this Court's decision in 1871 in *The Syracuse*.

In *The Syracuse*, the owner of a canal boat, lost while being towed from Albany to New York, sought a recovery for the value of the boat, charging that the towing vessel was a common carrier. The respondent, owner of the towing vessel (the SYRACUSE), claimed that the towage was performed under a contract which provided that the canal boat was to be towed "at the risk of her master and owners", and that liability was released in advance, but this Court held the defense unavailing. The summary of the argument of eminent admiralty counsel for the Steamboat SYRACUSE (Mr. Benedict), reported in the official reports of the case,[12] indicates that he did not approach the problem with any thought that the interpretation of the towage contract would be the principal point in the case. His argument

[10] 287 U.S. 291 (1932).

[11] "The decree under consideration is not in conflict with the decisions of this Court cited by petitioner, *The Steamer Syracuse*, 12 Wall. 167, and *Compania de Navegacion v. Ins. Co.*, 277 U.S. 66, 48 S. Ct. 459, 72 L. Ed. 787. Neither involved an agreement similar to the provisions of the pilotage clause on which this case turns." (287 U.S. 295).

[12] 12 Wall. (79 U.S.) 167, 170.

was directed to the factual issue of whether or not the SYRACUSE was negligent in the handiing of the tow, and apparently he did not even attempt to convince the court that all risks of navigation, including the risk of negligent towage, had been assumed by the tow. It is to be borne in mind that the canal boat was under the control of its own crew during the towage, so the "risks" assumed might have been those of navigation and non-marine perils, as well as the risk of negligence of the SYRACUSE. This was certainly Mr. Benedict's conception of the issue, for he argued that "he [the master of the canal boat] would bear the risks of navigation, provided the steamboat which furnished the propulsion power was navigated with ordinary care and skill."

Because of this presentation, it is not surprising that the question which all counsel today agree was the important one did not then seem to be of any great moment. The meaning of the release clause was disposed of in one short paragraph, and the decision was affirmed on a finding that the damage to the canal boat was occasioned through the negligence of the steamboat. Mr. Justice Davis, who delivered the opinion of the court, held that even though the canal boat was being towed at her own risk, the steamer was nevertheless liable for the damages if the canal boat suffered a loss through the negligent navigation of the steamer. He pointed out that, although the steamboat was not required to tow as a common carrier, she was required to exercise reasonable care, caution and maritime skill, and that if those factors were neglected and a disaster occurred, liability must be visited upon her.

When *The Oceanica* [13] came before the Second Cir-

[13] 170 Fed. 893 (2 C.C.A. 1909).

cuit Court of Appeals in 1909, thirty-nine years after *The Syracuse*, the ruling as to the meaning of a release clause in a towage contract was questioned in no uncertain terms. The OCEANICA was a steam vessel whose owners agreed to tow a barge, the MASSASOIT, under a contract which contained a clause that the MASSASOIT was to assume all risks. During the course of the voyage, the tug broke her propeller, cut her tow lines and permitted the barge to fetch up on a pier, where it became a total loss. In a libel by the tow's owner for their damages, the defense was that the towing vessel had been released from negligence. The majority of the Court upheld this contention, saying:[14]

> "We are confronted at the outset of the case with the preliminary question whether the agreement made released the tug and her owners from liability for the loss of the tow, even if it was due to the negligence of those in charge of the tug. In this state [New York] a common carrier may contract against his own negligence; but such a contract will not be construed to cover the carrier's negligence, unless intention to do so is expressly stated. The reason is that, the stipulation having something besides negligence to apply to, viz., the carrier's liability as insurer, it will not be supposed that the parties intended to cover the carrier's liability for his own negligence, unless that is expressly, or by necessary inference, included. *Canfield v. B. & O. R. R. Co.*, 93 N.Y. 532, 45 Am. Rep. 268; *Kenney v. N. Y. C. & H. R. R. R. Co.*, 125 N.Y. 422, 26 N.E. 626. In England, where a carrier may contract against his own negligence, the law is the same. Beven on Negligence (2d Ed.) p. 1128. The same rule was laid down by the Supreme Court of the United States, before it had decided in *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, on grounds

[14] 170 Fed. 894.

of public policy, that a common carrier could not contract against liability for his own negligence. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465.

"A tug is not, in relation to its tow, a common carrier, being only bound to the exercise of ordinary care. *The Margaret*, 94 U.S. 495, 24 L. Ed. 146. It follows that a contract against liability for negligence cannot be construed in the case of a tug as it may be in the case of a common carrier. The tug being only liable for negligence, if the tow agrees to assume all risks, no risks can be meant except those for which the tug is liable, viz., the consequences of her own negligence. There is no other class of risks upon which the clause can operate as in the case of common carriers, viz., those arising from liability as insurer. Unless construed to cover the tug's negligence, the stipulation is meaningless; i. e., an agreement by the tow to assume risks to which she is subject without any stipulation and for which there is no liability at all on the part of the tug." [15]

On rehearing, the Court reaffirmed its holding. The organ of the majority of the Court, Judge Ward, stated that he appreciated keenly that the decision of the majority as to the right of a tug to contract against her own negligence was a departure from previous opinions, and expressed the hope that the matter would be

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[15] The opinion proceeds with a discussion of *The Syracuse*, *supra*, and concludes that Mr. Justice Davis

"* * * must have meant that an agreement by the tow to tow at her own risk should not be construed to cover the tug's negligence. This was the view of Judge Nelson in the court below (*The Syracuse*, 6 Blatchf. 2, Fed. Cas. No. 13,717), who began his opinion with these words:

'One ground of defense set up is that by the contract of towage it was agreed that the canal boat was to be towed by the steamer at her own risk. The answer to this is that this contract does not exempt the steamboat from liability for damages caused to the canal boat by the negligence of those in charge of the steamboat.'"

set at rest in that case by the Supreme Court, but an application for a certiorari was denied.[16]

Following its decision in *The Oceanica*, and before any further pronouncement on the matter by this Court. the Second Circuit consistently held valid and enforceable agreements whereby towers released themselves from liability for damage to the tow occasioned by negligent towage.[17] The highest court of the State of New York also held such release towage agreements valid.[18] In the Fifth Circuit, the District Court for the Southern District of Georgia, in *The Pacific Maru*[19] also held these release towage agreements valid; but in the Ninth Circuit they were held invalid.[20]

The question was again presented to this Court in 1928 in *The Wash Gray*.[21] That was a suit by the owner of a steam tug, the WASH GRAY, to recover the proceeds of insurance on the tug which became a total loss while being towed from Tampico to Galveston by the FREEPORT SULPHUR NO. 1. The towage contract contained the provision that:

"Freeport Sulphur No. 1 will furnish hawser.

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[16] 215 U.S. 599.

[17] *Monk v. Cornell Steamboat Co.*, 198 Fed. 472 (2 C.C.A. 1912); *Ten Eyck v. Director General of Railroads*, 267 Fed. 974 (2 C.C.A. 1920), certiorari denied 254 U.S. 646; *The Energy-Altamaha*, 1926 A.M.C. 917 (D.C. S.D. N.Y. 1922); *The Mercer*, 14 F. 2d 488 (D.C. E.D. N.Y. 1926).

[18] *Graves v. Davis* (C.A. N.Y. State, 1923), 235 N.Y. 315, 1923 A.M.C. 490.

[19] 8 F. 2d 166 (1925).

[20] *Alaska Commercial Co. v. Williams*, 128 Fed. 362 (9 C.C.A. 1904); *Mylroie v. British Columbia Mills Tug & Barge Co.*, 268 Fed. 449 (C.C.A. 9, 1920), certiorari granted 255 U.S. 566, and case decided on other grounds 259 U.S. 1, which the Court said "makes it unnecessary for us to consider the contention on behalf of the barge that the exemption clause is void;" *Sacramento Navigation Company v. Salz*, 3 F. 2d 759 (9 C.C.A. 1925), certiorari granted 268 U.S. 683, and reversed on other grounds 273 U.S. 326; *The Sea Lion*, 12 F. 2d 124 (D.C.N.D. Cal. 1926).

[21] *Supra.*

> All other risk and expense to be borne by the tug. It is understood you will keep sufficient men on board to keep up stream and man the tug's pumps. S.S. Freeport No. 1 is not responsible in any way for loss or damage to the Wash Gray".

The insurers contended that the release towage clause violated a warranty in their policy and thereby the insurance was voided. This Court held that the clause did not release the towing vessel from any loss or damage to the tow due to the negligence of the master or crew of the towing vessel, and disposed of the question by referring to *The Syracuse* and stating that: "In view of this state of the law, the towing contract here shown was not a fact material to the risk, * * * "

What this Court meant by its decision in *The Wash Gray* has caused considerable divergence of opinion: on the one hand, the decision has been interpreted as holding that towers are prohibited from contracting against liability for negligent towage; and on the other, that the particular release clause there construed was ineffectual because it did not evidence any clear intent to relieve the tower from liability for the negligence of the master and crew of the towing vessel. The correctness of the second contention is supported by the decision in this Court in *Sun Oil Company v. Dalzell Towing Company*,[21] decided only four years after *The Wash Gray*, wherein Your Honors stated unequivocally that the decisions in *The Syracuse* and in *The Wash Gray* did not go beyond an interpretation of the language of the agreements construed in those cases.[22]

In *Sun Oil Company v. Dalzell Towing Company*

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[21] *Supra.*
[22] See Footnote No. 11, *ante*, Page 5.

there was involved a collision of a tanker in tow of three Dalzell tugs in the harbor of New York. As was customary on the East Coast, the master of one of the Dalzell tugs went on the bridge of the ship to act as pilot. New York is not a compulsory pilotage port, but by reason of the heavy harbor traffic and the peculiar situations which are met in navigation there, invariably the master of one of the tugs towing an ocean going vessel pilots her through the harbor. In this case the towage was performed under a so-called "pilotage clause" [23] which constituted the master of the tug the servant of the tow in the performance of the towage service. The ship having been damaged through the negligence of the tug master-pilot, litigation ensued in the Southern District of New York wherein the pilotage clause was plead as a defense. In the District Court, Judge Knox, quite experienced in admiralty matters, upheld the validity of the clause. On appeal to the United States Circuit Court of Appeals for the Second Circuit, the case was heard by three eminent judges familiar with the law of admiralty, Judges Swan, Learned Hand and Augustus N. Hand, who unanimously upheld its validity and differentiated the case from *The Syracuse* and *The Wash Gray* because of the differences in the import of the release clauses involved.[24] This Court granted certiorari and unanimously held that the validity of the clause "cannot reasonably be doubted". Your Honors pointed out that the service to be rendered under the agreement was not a common carrier service

[23] " 'When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of the owners in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom.' " (287 U.S. 291, 292).

[24] See note No. 11 *ante* page 5.

or a bailment, and that "There is no foundation in this case for the application of the doctrine that common carriers and others under like duty to serve the public according to their capacity and the terms of their undertaking cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence".

The majority of the District and Appellate Federal Courts have construed the *Sun Oil Company-Dalzell Towing Company* Case as authority for the proposition that towers may contract against liability for negligent towage and that the only question involved in each case is whether the release towage clause effects such a release. This clearly appears from a review and analysis of the decisions of the District and Appellate Federal Courts since the *Sun Oil Company-Dalzell Towing Company* decision.

In the Third Circuit [25] and in the Fourth Circuit [26] the Courts have declared a release towage clause of proper import valid to release a tug from its negligence. The United States Court of Appeals for the Ninth Circuit will probably reach the same result when the matter is presented to it again.[27]

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[25] *Texas Co. v. Lea River Lines, Inc.*, 206 F. 2d 55 (C.A. 3, 1953).

[26] *The St. Francis*, 72 F. Supp. 50 (D.C. Md. 1947).

[27] A somewhat analogous case is *Hall-Scott Motor Car Co. v. Universal Ins. Co.*, 122 F. 2d 531 (C.A. 9, 1941), a suit to recover damages resulting from the loss of a yacht destroyed while in the custody of the Hall-Scott Motor Company having its motor replaced. The Court took note (122 F. 2d 535) of *The Wash Gray* as "unquestionably" settling the rule "that 'a clause in a towage contract declaring that the towing boat shall not be responsible in any way for loss or damage to the tow, does not release the former from loss or damage due to the negligence of her master or crew' ". The Court then reviewed *Sun Oil Company - Dalzell Towing Company* (122 F. 2d 536) and quoted therefrom extensively; then reviewed the jurisprudence of the Supreme Court in carrier cases involving non-common carrier accidents, and reached the conclusion (122 F. 2d 537): "It follows from the foregoing authorities that a contract exempting one of the parties thereto from the results of his negligence is legal unless public policy forbid such contract."

The Sixth Circuit in *Walter G. Houghland, Inc. v. Muscovalley*[28] held that where towing was being performed at the "owner's risk", that contract did not release the tower from liability for negligent towage. We submit that there is nothing in that opinion which indicates that the Court would not have held valid either the pilotage clause or a release clause which clearly evidenced the intention to release the tower from liability for damage to the tow from negligent towage, though, as to the latter the contrary view has been taken by others.

The Fifth Circuit has unequivocally held that release towage agreements are not against public policy, are valid and enforceable, and has upheld their validity in those cases where the clause evidences a clear intent to effect such a release.[29] The jurisprudence in the Fifth Circuit culminated in the decision of the United States District Court for the Eastern District of Louisiana in the instant case, wherein the District Judge held invalid that portion of the release towage clause which released the tug from negligent navigation but held valid the second portion, which was a pilotage clause.[30] On appeal the Court held both portions of the release clause valid[31] and that is this case, which is now before Your Honors for review.

In the Second Circuit, in a number of cases, the validity of the release towage clause was upheld.[32]

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[28] 184 F. 2d 530 (C.A. 6, 1950).

[29] *Hendry Corp. v. Aircraft Rescue Vessels*, 113 F. Supp. 198 (D.C.E.D. La. 1953); *Mengel Co. v. Inland Waterways Corp.*, 34 F. Supp. 685 (D.C.E.D. La. 1940).

[30] For the wording of the clause see Note 6, *ante*, Page 2.

[31] 211 F. 2d 401 (1954).

[32] *The Harris No. 2*, 45 F. Supp. 282 (D.C. N.Y. 1942); *The Melvin and Mary*, 23 F. Supp. 398 (D.C. N.Y. 1938); *The John J. Feeney*, 3 F. Supp. 270 (D.C. N.Y. 1933); *The Primrose*, 3 F. Supp. 267 (D.C. N.Y. 1933).

Finally, in 1954, the United States Court of Appeals for the Second Circuit in *North River Barge Line v. Chile S.S. Co.*[33] held that the effect of *Sun Oil Company-Dalzell Towing Company* was to accept the doctrine of *The Oceanica*, saying:[34]

> "Remembering that the operator of a tug is not a public carrier and that, without this agreement against liability, McAllister could and would have refused to undertake towage through the river when ice-laden, we think the agreement valid. See *The Oceanica*, 2 Cir., 170 F. 893. A contrary *dictum* in *The Syracuse*, 12 Wall. 167, 20 L. Ed. 382, was approved in *Compania de Navegacion v. Firemen's Fund Ins. Co.*, 277 U.S. 66, 73-74, 48 S. Ct. 459, 72 L. Ed. 787. But we think that *Sun Oil Co. v. Dalzell*, 287 U.S. 291, 53 S. Ct. 135, 77 L. Ed. 311, is to be taken as, in effect, accepting the doctrine of *The Oceanica*. See also *Graves v. Davis*, 235 N.Y. 315, 319-320, 139 N.E. 280; *Nielson v. United States*, 2 Cir., 209 F. 2d 958, affirming, D.C., 112 F. Supp. 730; cf. *Santa Fe P. & P. Railway Co. v. Grant Bros.*, 228 U.S. 177, 188-189, 33 S. Ct. 474, 57 L. Ed. 787."

Accordingly, it amply appears that not only is there no "rule" which prohibits a tower from contracting to be released from liability for his negligence, but that by the weight of judicial authority such release towage clauses are valid and will be given full effect according to their import.

Further, it appears that there is no reason in law or public policy why such release towage agreements should be prohibited.

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[33] 213 F. 2d 882 (C.A. 2, 1954).
[34] 213 F. 2d 884.

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The Public Policy

Petitioners contend vigorously that it is against public policy to permit a tower to contract against liability for damage to the tow arising out of negligent towage. It is our contention that not only is such public policy non-existent, but, on the contrary, the highest public policy is found in enforcing such contracts as written.

Initially, the relation of a tug to its tow must be considered. While at common law towing was a common calling,[35] as early as 1876 this Court in *The Margaret*[36] held that a tug is not a common carrier and that the laws of common carriage have no application to a towage contract. In 1932 in *Stevens v. The White City*,[37] generally recognized as the leading case on the subject, this Court reiterated that a tug is not a common carrier and held that a tug is not the bailee of its tow or its cargo. In *Sun Oil Co. v. Dalzell Towing Co.*,[38] this Court again reiterated its holding that in rendering a towage service a tower is not a common carrier or bailee or bound to serve or liable as such. These major premises of law—that a tug is neither a common carrier nor a bailee of its tow or liable as such—are so firmly embedded in our jurisprudence that we do not labor the point. If a tug is not a common carrier or bailee of its tow or liable as such, what, then, is the "public policy" which forbids a tower and the owner of a tow to contract with each other that the tower shall be relieved from liability for loss of or damage to the tow occasioned by the towboat's negligence? On the contrary, the highest public policy is found in the en-

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[35] *Sproul v. Hemmingway*, 14 Pick., Mass., 1, 6, 25 Am. Dec. 350, cited in *Cornell Steamboat Co. v. United States*, 321 U.S. 634.
[36] 94 U.S. 494 (1877).
[37] 285 U.S. 195 (1932).
[38] 287 U.S. 291 (1932).

forcement of the contract which was actually made, as this Court has had occasion to point out in no uncertain terms.

Forty years ago, in one of the most important cases on this subject, a landmark in the jurisprudence, *Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co.*,[39] this Court had before it the question of the right of a common carrier to contract against liability for its negligence when engaged in activities not within the scope of common carriage. Your Honors held the clause in the contract releasing the Railway Company from liability for its negligence entirely valid and, speaking of the public policy involved, said:

> "The parties, then, were free to make their own bargain as to this transportation, and the liability which should attach to it. There is no rule of public policy which denies effect to their expressed intention, but, on the contrary, as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made. Undoubtedly, it is not to be lightly concluded that the railroad company has been relieved from liability for its neglect, but, on the other hand, if this was the agreement as fairly interpreted, it is not to be arbitrarily overridden. The parties were on equal footing. The risk of loss or damage to the grading outfit or supplies from any cause, while being transported over the line of the railway company, could be assumed by one party or the other, as they saw fit. This risk was an item which naturally would enter into the calculations of the parties with respect to the rate to be charged by the railway company. We are not at liberty to revise the contract, and the question simply is whether the stipulation against

[39] 228 U.S. 177 (1913).

liability, in view of the reduced rates, covered all losses,—those which might be due to the carrier's neglect, as well as others."

Again, in *Sun Oil Co. v. Dalzell Towing Co.*,[40] this Court in discussing the pilotage clause in the light of public policy, said:[41]

> "The validity of its applicable provision cannot reasonably be doubted. So far as concerns the service to be rendered under the agreement, respondent was not a common carrier or bailee or bound to serve or liable as such. Towage does not involve bailment, and the services covered by the contract were less than towage. *Stevens v. The White City*, 285 U.S. 195, 200, 52 S. Ct. 347, 76 L. Ed. 699. There is no foundation in this case for the application of the doctrine that common carriers and others under like duty to serve the public according to their capacity and the terms of their undertaking cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence. *N. Y. C. Railroad Company v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 440, 9 S. Ct. 469, 32 L. Ed. 788. Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. And petitioner was under no compulsion to accept the terms of respondent's pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length. 'There is no rule of public policy which denies effect to their expressed intention, but, on the contrary, as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made.' *Santa Fe, P. & P. Rail-*

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[40] *Supra.*

[41] 287 U.S. 294.

way Co. v. Grant Brothers, 228 U.S. 177, 188, 33 S. Ct. 474, 478, 57 L. Ed. 787."

The Court remarked that under the circumstances it would be "unconscionable" for the owner of the tow "upon occurrence of a mishap to repudiate the agreement upon which it obtained the service".

We have, therefore, the unequivocal holding of this Court that where there is no question of common carriage involved, "the highest public policy is found in the enforcement of the contract which was actually made". In opposition to this pronouncement, Petitioner cites [42] from Judge Coxe's dissenting opinion in *The Oceanica* [43] that it ought to be against public policy to permit a vessel to contract against her own fault because "to allow her to do so begets recklessness, carelessness and neglect"; and that the same reasons for prohibiting such a contract apply as in the case of common carriage, though perhaps not to the same extent. Though we have great respect for Judge Coxe's opinion, nevertheless, it is the opinion of only one judge, not only wholly unrealistic when viewed in the light of the custom which has prevailed for a hundred years in the United States, but also contrary to decisions of this Court and to the weight of authority in the other courts of this country. Time and time and time again the courts of this country have put their stamp of judicial approval upon contractual releases from liability for negligence in non-maritime as well as in admiralty matters, and yet, every one of them was subject to the same theoretical objection, that to permit a man to contract against his negligence begets recklessness, carelessness and neglect. How-

[42] Petitioner's brief, page 5.

[43] *Supra*.

ever, experience has proven that this objection remains theoretical and has not been real. Why should a towage contract be differentiated from any other service contract which does not involve common carriage or bailment, such as well-drilling, building and construction work, and a host of others wherein the courts have sanctioned agreements relieving from liability for negligent conduct?

As this Court aptly remarked in the *Sun Oil Co.-Dalzell Towing Co.* Case [44] there was nothing to suggest there that the parties were not on equal footing or that they did not deal at arm's length. The same is equally true here. Towers, as a class, do not differ greatly if at all from those for whom they perform towage services, as a class. Towers as a class range from the innumerable small operators, many of whom own but a single tug and in many instances operate it themselves, up to the numerous large operators who own and operate large fleets of tugs. The same diversification is found among those for whom towages are performed. They range from the innumerable small operators owning one barge up to the numerous large operators owning fleets of barges or steamships. We reiterate, therefore, that as a class, towers do not differ greatly if at all from those for whom they perform towage services as a class.

Of course, this is not to say that in a particular case the bargaining advantage does not lie with the tower or in other cases with the party for whom the towage is to be performed; but because in a particular case one party had an advantage at the bargaining table is no reason why the contract entered into after dealing at arm's length should not be enforced. The concern of the courts is in protecting the legitimate interests of towers

[44] *Supra.*

as a class as opposed to the interests, as a class, of those for whom they perform towage. The rule necessarily must be one applicable to large vessels and to barges, to single tugs and large fleets of tugs, and for towages on rivers, in harbors and on the high seas, and if the right to contract is limited as to any single operator in either class, it must be limited as to all.[45]

Furthermore, obviously, rates charged for towage necessarily take into consideration the risk assumed by the tower and the costs to tower of his insurance.[46] Whatever insurance is available to towers is equally available to those for whom towage is performed, and it may be assumed fairly that when a contract of towage has been entered into, the party who risks the liability for damage to the tow through negligent towage, whether it be the tow's owner or the tower, insures that risk. Such is the normal action of businessmen. Accordingly, the question to a large extent devolves into this: If a tower does not exempt himself from liability he must add to the price of the towage the premium on the insurance; if he exempts himself, then the party for whom the towage is performed secures the towage at a lesser price and insures the risk at his expense. Having agreed where the risk shall lie and having agreed that the tower shall be exempted from liability so that the tower does not protect himself with insurance, it would be "unconscionable" for the owner of the tow "upon occurrence of a mishap to repudiate the agreement upon which it

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[45] Judge Barrett, District Judge of the Southern District of Georgia in *The Pacific Maru*, 8 F. 2d 166, 173 (1925).

[46] "This risk [of loss] was an item which naturally would enter into the calculations of the parties with respect to the rate to be charged by the railway company". *Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co.*, 228 U.S. 177. And Judge Barrett in *The Pacific Maru, supra*, expressed the opinion that if a tower be denied the right to contract against liability for damage to the tow occasioned by negligent towage "it may well be that the increased rates for service will be so great as to severely impair the commerce of the country". (8 F. 2d 173).

obtained the service"[47] and to visit liability upon the tower either for the benefit of the owner of the tow or perhaps, as in many cases obviously occurs, for the benefit of the insurer of the tow who has been paid a premium to undertake that liability.

Petitioners say[48] that there is a "practical universality of the practice among towers of inserting in their towage contracts stipulations against liability for their own negligence", said by them to be demonstrated "both by the motion of *amici curiae* in the Court of Appeals" which they reprint as an appendix to their brief and "by the large number of cases in the various courts involving such stipulations" cited in their brief and the brief to the two companion cases here. While obviously one desiring to have towage performed is somewhat restricted in his choice of a tower who will perform the towage without being relieved from liability for damage to the tow occasioned through negligent towage, there is nothing in the record, nor do we conceive it to be a fact that there are not many towers who will perform towages upon the basis of their legal liability for damage to the tow, or even assume complete liability for the safety of the tow, howsoever damaged, provided, of course, that they are sufficiently remunerated for the service. However, even if we assume, though certainly we do not concede, that there is a "practical universality" in the practice of inserting in towage agreements clauses releasing the tower from liability for damage to the tow resulting from negligent towage, we submit that that is no reason for declaring the practice invalid. If, as must be admitted, a private or contract tower is under no obligation to perform a towage service on any basis, then on

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[47] *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S., 291, 295.

[48] Note 22 on Page 12 of their brief.

what theory can he be required to perform it on the basis of assuming liability for damage to the tow occurring through negligent towage? We reiterate: the contract of towage is no different from any other contract to perform a service which does not involve common carriage or a bailment. As an example, suppose that some oil well drillers refused to drill an oil well for a customer unless the customer assumed liability for all damages arising from negligent drilling. Is not the answer to one dealing with such a driller: accede to the well driller's requirements, find another driller amenable to your requirements, or drill the well yourself? Suppose that certain cleaning establishments refused to clean suits of clothes unless the customer assumed liability for damage to the garments resulting from the cleaning. Would not that require the customer to accede to the cleaner's demands, seek out another cleaner who was less demanding, or clean this garment himself? Is not the same true of towage?

Lastly, petitioners urge[49] that the rule that towers are not permitted to relieve themselves of liability for damage to the tow caused by negligent towage has existed for so long a time that it should not now be disturbed "especially in the light of Congress' abstention from alteration of the rule in the course of the intervening regulatory activities in the field"; and they add that "it is worthy of particular note in this connection, that Congress has never seen fit to encourage the towage industry by extending to towers the privileges, for exoneration from liability, granted to cargo vessels, for encouragement of that branch of maritime commerce, by the Harter and Carriage of Goods by Sea Acts."

This contention is completely fallacious. The im-

[49] Petitioner's Brief, page 11.

munities granted by the two cited Acts are not to "cargo vessels" but to common carriers by water. It is elementary that this left private carriers by water in the same situation as other private carriers: free to contract for such immunities as they saw fit, untrammeled by statutory prohibition. Since there never has existed any rule that a private carrier or tower could not contract against his liability, obviously it would be impossible for Congress to alter a non-existent rule. Is not the opposite true inasmuch as Congress has never seen fit, except as to that towage subject to Part III of the Interstate Commerce Act, to prohibit a tower from exempting itself from liability for negligent towage, notwithstanding the fact that it has leveled that prohibition against common carriers by the Harter Act [50] and by the Carriage of Goods by Sea Act? [51]

The absence of congressional action *quoad* release towage agreements led Judge Barrett in *The Pacific Maru* [52] to express the opinion that no prohibition should be leveled at them in the absence of congressional action. He said there:

> "So far as is disclosed, the contracts containing such exemptions have worked satisfactorily in the commerce of the country for many years, and this court would be bold indeed to declare such a practice against public policy, in the face of such record and of the inaction of the states and of the Congress."

At the time that Judge Barrett expressed this opinion, 1925, he was, of course, correct: Congress had not at that early date declared any policy whatsoever with regard

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[50] Sections 1 and 2. Post, Appendix, Page 35.
[51] Section 3. Post, Appendix, Page 36.
[52] 8 F. 2d 166, 173.

to towage or sought to regulate that field. However, fifteen years later, in 1940, Congress regulated towage in the Transportation Act of 1940,[53] commonly known as Part III of the Interstate Commerce Act.

Considering the pertinent provisions of that act, this Court in *Cornell Steamboat Company v. United States*,[54] held that the Cornell Steamboat Company, which operated towboats for hire on the Hudson River and in and about New York harbor, though the tugs carried no cargo, but moved scows, barges and similar vessels belonging to others, which themselves usually carried cargo, were "water carriers" within the meaning and intendment of Part III of the Interstate Commerce Act. The Court recognized in its Footnote No. 2[55] that Section 320 (d) of Part III of the Act specifically provided: "Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part."

What is the net result of this decision? A common carrier subject to Part III of the Interstate Commerce Act, when performing a towage of a barge in a movement not specifically exempted under the act, has the benefit of the exemption of Section 3 of the Harter Act,[56] which relieves the carrier from liability "for damage or loss resulting from faults or errors in navigation or in the management of said vessels". On the other hand, the private carrier, whether or not subject to Part III

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[53] 49 U.S.C., 901, *et seq.*
[54] 321 U.S. 634 (1944).
[55] 321 U.S. 637.
[56] Post, Appendix, Page 36.

of the Interstate Commerce Act, not only does not have the benefit of the exemption from liability contained in the Harter Act and the Carriage of Goods by Sea Act, but, according to the Petitioner's theory, he would not be permitted to contract for such exemption. This would produce the anomolous situation of a common carrier having less liability than one not engaged in common carriage.

The incongruity of this situation is best demonstrated by this example: If Mississippi Valley Barge Line Company, a certificated common carrier subject to Part III of the Interstate Commerce Act, towed a barge of steel products for a steel company between points A and B, Mississippi Valley Barge Line Company automatically and by operation of law would be afforded the exemption from liability for loss or damage provided by Section 3 of the Harter Act. Nevertheless, if in the same tow, Mississippi Valley Barge Line Company undertook to transport between the same points a cargo of petroleum products in a tank barge certificated by the Coast Guard (and, therefore, exempt from Part III of the Interstate Commerce Act,[57]) not only as to that barge the Mississippi Valley Barge Line Company would not have the benefit of the exemption provided by Section 3 of the Harter Act, but, if the contention of the Petitioner here prevails, it could not even contract for such exemption. We would, therefore, be presented with the example of a tower with a different liability to two different barges in the tow and unable by contract to attain a uniform liability. Obviously Congress did not and could not have intended to bring about any such incongruity.

Petitioner, in the "Conclusion" to its brief, invokes

[57] Section 303 (d); 49 U.S.C. 903 (d).

the doctrine stated by this Court in *United States v. Atlantic Mut. Ins. Co.*:[58] Congress and not shipowners should change a positive rule. Of course, there this Court had under consideration the long existing general rule continued in the Harter Act and in the Carriage of Goods by Sea Act,[59] that common carriers cannot stipulate for immunity from their own negligence, and held that the so-called "both-to-blame clause" amounted to an attempt by a common carrier to stipulate against the effects of its own negligence. Petitioner's attempted application of that doctrine is specious here where, as pointed out, no rule has been created either by jurisprudence or by statute prohibiting contracts whereby the tower exempts itself from liability for damage to the tow caused by the negligence of the towboat (except as to common carriers performing towage subject to Part III of the Interstate Commerce Act).

It amply appears, therefore, that common carriers performing towages subject to Part III of the Interstate Commerce Act are exempted from liability for negligent towage by virtue of the provisions of the Harter Act or the Carriage of Goods by Sea Act, as appropriate, and that there is not only no rule of public policy or statutory provision which prohibits a private carrier or tower from entering into a contract exempting itself from liability, but the highest public policy lies in permitting a tower not subject to Part III of the Interstate Commerce Act so to do, thereby placing itself on a parity with the common carrier.

The English Rule

While the English jurisprudence is in no degree binding on this Court, the determination by an English

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[58] 343 U.S. 236, 242 (1952).
[59] Post, Appendix, Page 36.

court of any matter of admiralty and maritime jurisprudence should be highly persuasive. We do not here attempt to review the voluminous English jurisprudence on the subject, but we refer to one case because of the striking similarity between the questions there and here presented.

In *The President Van Buren*[60] the plaintiff, the Port of London Authority, claimed for damage sustained by their Tug SIRDAR in a collision between the tug and the PRESIDENT VAN BUREN. The collision took place while the tug was engaged in assisting the PRESIDENT VAN BUREN inward bound from New York up the Thames. The towage was being performed under a contract, the pertinent part of which is recited in the extract from the opinion hereinafter quoted. The defendant, the United States Shipping Board, counterclaimed for the damage sustained in the collision by the PRESIDENT VAN BUREN, alleging that the collision was occasioned by the negligent navigation of the Tug SIRDAR and thereby called into question directly the validity and meaning of the release towage agreement. The case was heard on two preliminary questions: first, the validity of the agreement, and second, whether, if the Tug SIRDAR was guilty of negligent navigation, the United States Shipping Board was liable for all damage to the dock and to the SIRDAR. Discussing these two preliminary questions, Mr. Justice Hill said:

> "The first is whether the agreement set up by the plaintiffs is valid and not void as against public policy. The second is, assuming the agreement to be valid, whether, if the collision was solely caused or partly contributed to by negligence on the part of those in charge of the *Sir-*

[60] 16 N.S. Aspinall's Maritime Cases 444 (1924).

dar, the defendants are nevertheless liable for the whole of the damage occasioned by the collision. The contract which was sent in and signed by Moxon, Salt, and Co. Limited, as agents for the owners of the *President Van Buren*, on the face of it, asked for the supply of tugs on the terms and conditions endorsed, which terms and conditions they agreed to be bound by. The conditions endorsed, so far as material, were in the following terms: 'The masters and crew of the tugs and transport men shall cease to be under the control of the Port Authority during and for all purposes connected with the towage or transport and shall become subject in all things to the orders and control of the master or person in charge of the vessel or craft towed or transported and are the servants of the owner or owners thereof who hereby undertake to pay for any damage caused to any of the Port Authority's property or premises and to bear, satisfy and indemnify the Port Authority against liability for all claims for loss of life or injury to person or loss or damage by collision or otherwise to the vessel or to or by the vessel or craft towed or to or by any cargo or other thing on board the same or to or by any vessel cargo or property of any other person or persons or to the tug or tugs supplied, whether such damage loss or injury arise or be occasioned by any accident or by any omission, breach of duty, mismanagement, negligence or default of any of such masters, crew or men or any servant of the Authority or any other person or from or by any defect or imperfection in the tug or tugs supplied. * * * '

"Before considering the conditions, I should mention that the Port of London Authority are in control of the docks; that they own or hire the tugs used in the docks, the *Sirdar* being one of the tugs owned by them; that they supply all tugs for dock work and will not allow any outsider to do the work; and that wherever they do

supply tugs they insist upon the terms contained in this contract. The United States Shipping Board, the defendants, had an appropriated berth in the Tilbury Dock and were in the habit of using the Port Authority's tugs in that connection; and the *Sirdar* was one of the tugs they usually employed.

"On the first point as to whether the agreement is valid and not void as against public policy, I think the answer on this matter is that which I have already expressed, namely, that the English law, in my view, very fortunately regards business men as capable of knowing their own business and of making contracts for themselves and is very unwilling to limit the power of capable people to make what bargains they like. In truth, as we know, a contract in this form, or in a practically similar form, has become for a good many years past of almost universal use by tug owners; and whether a tug owner supplies a tug on these terms or on terms which reserve liability to himself (where he does it) it is only a question of price. If he is to have no liability, he can do the work very cheaply; if he is to run all the risks, then of course his reward must be sufficient not only to compensate him for the work he does, but to cover the insurance and, in fact, all the risks he runs. I can conceive no principle of public policy which should lead the courts to say: 'We ought to step in and say "This or that contract ought not to be made by competent people,"' when the people making it are competent people. It is said that the Port of London Authority is a monopoly. It is said that everybody has a right to the use of the tugs on equal terms, but here, it is said, you cannot employ any other tugs than the Port of London Authority's tugs. There it is. If you do not like these terms and if they are too onerous, nobody forces you to use the Port of London Authority's docks. I do not like to enlarge upon it because it seems to me to

be so clear that, if you are talking of public policy, the highest interest of public policy is that the law should not interfere with the transactions of business men when it can help it.

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"The form of contract aims, in the first place, at making the master and crew of a tug for the time being the servants of the ship which is being towed; in the second place its aim is to deal with damage caused to the Port Authority's own property; and in the third place its aim is to deal with liabilities which may be incurred by the Port Authority by reason of damage to the other people's property or to life. If the first section, which begins: 'The masters and crews of the tugs' and ends 'are the servants of the owner or owners' of the vessel towed, is effectual to do that which it sets out to do, it does not much matter what the rest of the conditions provide, because it will be that the Port of London Authority contemplates; and if it effectually makes the masters and crews of tugs servants of the ship which is being towed—servants for the time being—then it will follow that the owner of the tow cannot claim for damage brought about by people who for the time being are his own servants; and he must also be liable for damage caused to the authority's property by persons who for the time being are his servants, the servants of the owners of the tow.

"I have considered Mr. Batten's criticism. I think that clause does do what it sets out to do; and I think it sets out in terms that for all purposes connected with the towage the masters and crews of tugs are the servants of the owners of the tow. I do not think that can be limited in the way Mr. Batten suggests. I think it provides that for the purposes of the towage and for all purposes connected with the towage they are the

servants of the owners of the tow. That, I think, is enough to show that for any negligence of those in charge of the *Sirdar*—the master and crew of the *Sirdar*—the owners of the *President Van Buren* are liable to the authority, that is to say, for any damage to the *Sirdar*, and cannot themselves claim in respect of any damage done to the *President Van Buren.*

"I think it is also made quite clear by what follows that the owners of the tow undertake to pay for any damage caused to any of the Port of London Authority's property or premises. Thinking, as I do, that a portion of the conditions deals with the Port of London Authority's own property and is in contrast with the following part which deals with the liability of the Authority to other people, I see no reason for excluding from the general description of the Port of London Authority's property their tugs; and, in my view, therefore, the owners of the tow, the *President Van Buren*, have undertaken to pay for damage caused to the Port of London Authority's property, the tug *Sirdar.*

"In the third portion of the conditions they likewise undertake to bear loss or damage by collision to the vessel towed; and that includes all damage to the *President Van Buren.*

"I must therefore answer the issues by finding (1) that the agreement is valid; and (2) that, if those on board the *Sirdar* were negligent by solely causing the collision or contributing to the collision, the defendants are liable to the plaintiffs for the whole of the damage occasioned by them. I think that is the right way to answer the question as it is submitted; and, that being so, there will be judgment for the plaintiffs on the claim and counterclaim."

It therefore appears that the English view taken of this subject is the same as has been taken by this Court

as to the pilotage clause and by the majority of the District and Appellate Federal Courts with regard to the clause releasing a tower from liability for negligent towage.

The Release Towage Clause Here Under Consideration Is Valid

The Court of Appeals for the Fifth Circuit in the instant case held valid both portions of the release towage clause here under consideration.[61] The Court held, pursuant to views which we had urged in *amicus curiae* brief filed there, that both paragraphs of the clause read as a whole showed a clear intent by the tower to relieve itself from liability for damage to the tow caused by the towboat's negligence; that, there being no question as the intent of the parties, The SYRACUSE and The WASH GRAY were distinguishable because of the differences in the wording of the clauses therein interpreted; and accordingly the clause in the instant case was held valid. The Court also upheld the "pilotage clause".

The Petitioner not only attacks the decision upholding the release towage agreement as a release from negligence,[62] but also attacks the validity of the pilotage clause as applied to this case. The Petitioner would have the doctrine of *Sun Oil Co. v. Dalzell Towing Company*[63] restricted and declared inapplicable to towages of dumb barges. They foundation their argument[64] on an ex-

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[61] This clause is quoted in our note No 6, *supra*, Page 2.

[62] The grounds for attack and the validity of the clause have been discussed hereinbefore.

[63] *Supra*.

[64] Their brief, page 7.

cerpt [65] from *Stevens v. The White City* [66] and the treatment of the tower's "control" of the tow in Judge Clark's concurring opinion in *B. Tarecamo Towing Corporation v. United States* [67] and in the opinion on rehearing in *Sternberg Dredging Company v. Moran Towing & Transportation Company.* [68]

The excerpt from *Stevens v. The White City* is lifted from context, and for a full understanding of the Court's holding, the remainder of the same paragraph must be considered. We add it here:

> " * * * The owner of the Drifter did not surrender to respondent any right of control that does not pass in virtue of a contract merely for towage. The fact that the man put aboard by the builder did not remain to the end or that the owner did not choose to keep some one on the tow is immaterial."

It therefore appears unequivocally that the DRIFTER, the tow whose damage was the basis for the *Stevens-White City* litigation, was unattended and wholly within the control of the towing vessel. Because of this fact, Petitioner's argument that the *Stevens-White City* doctrine does not extend to an unmanned barge is founda-

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[65] For the ready reference of the Court, the excerpt is reproduced here as printed in the opinion:

> "The tug does not have exclusive control over the tow, but only so far as is necessary to enable the tug and those in charge of her to fulfill the engagement. They do not have control such as belongs to common carriers and other bailees. They have no authority over the master or hands of the towed vessel beyond such as is required to govern the movement of the flotilla. In all other respects and for all other purposes the vessel in tow, its cargo and crew, remain under the authority of its master; and, in emergency, the duty is upon him to determine what shall be done for the safety of his vessel and her cargo. In all such cases the right of decision belongs to the master of the tow and not to the master of the tug. A contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment. * * * ".

[66] *Supra.*

[67] 127 F. 2d. 1001 (C.A. 2, 1942).

[68] 200 F. 2d. 603 (C.A. 2, 1952).

tioned on quicksand. The references to *B. Turecamo Towing Corporation v. United States*[69] and *Sternberg Dredging Co. v. Moran Towing & Transportation Company*, do not in any way affect the *Stevens-White City* doctrine as pronounced by this Court.

Suffice it to say that there has been no reported case that we have seen which undertakes to restrict the validity of the pilotage clause approved in *Sun Oil Co. v. Dalzell Towing Co.* so as to make it inapplicable to a dumb barge, and there does not appear to be any possible reason for so restricting it when one considers the fact that the DRIFTER[70] was an unmanned vessel.

CONCLUSION

In conclusion it is submitted that the towage release clause here under consideration is valid and relieved the Inland Waterways Corporation of liability for the loss of the BISSO NO. 9, and that the decree of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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New Orleans, Louisiana,
December 14, 1954.

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[69] Before the Court of Appeals only on a question of pleading.
[70] The damaged tow in the *Stevens-White City* litigation.

APPENDIX

Sections 1, 2 and 3 of the Harter Act

46 U.S.C. 190. Stipulations relieving from liability for negligence. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. (Feb. 13, 1893, c. 105, § 1, 27 Stat. 445.)

46 U.S.C. 191. Stipulation relieving from exercise of due diligence in equipping vessels. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. (Feb. 13, 1893, c. 105, § 2, 27 Stat. 445.)

46 U.S.C. 192. Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. (Feb. 13, 1893, c. 105, § 3, 27 Stat. 445.)

Carriage of Goods by Sea Act

46 U.S.C. 1303 (8). Limitation of liability for negligence

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter or section 25 of Title 49, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability. (Apr. 16, 1936, c. 229, § 3, 49 Stat. 1208.)

46 U.S.C. 1304. Rights and immunities of carrier and ship—Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(*l*) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(*o*) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.